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No. 02-361

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL.

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QUESTIONS PRESENTED

1. Whether the Children's Internet Protection Act (CIPA) induces public libraries to violate the First Amendment.

2. Whether CIPA imposes unconstitutional conditions on funding to public libraries in violation of the First Amendment.

PARTIES

All parties to the proceedings are set forth in appellants' Jurisdictional Statement.

Appellees joining this brief are: American Library Association, Inc.; Freedom to Read Foundation; Alaska Library Association; California Library Association; New England Library Association; New York Library Association; Association of Community Organizations for Reform Now; Friends of the Philadelphia City Institute Library; Pennsylvania Alliance for Democracy; Elizabeth Hrenda; and C. Donald Weinberg.

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This case raises the question whether Congress may use federal funding conditions to impose sweeping, unprecedented speech restrictions on public libraries nationwide. The unanimous three-judge district court correctly held, based on extensive evidence and uncontested findings, that CIPA induces public libraries to violate the First Amendment by mandating the use of Internet blocking software by adult patrons, children, and even library staff. Although the Government attempts to shield CIPA from any heightened constitutional scrutiny, the First Amendment applies with full force to a library's provision of public access to the Internet, a boundless medium dedicated to free and open expression. A public library may not, consistent with the First Amendment, open that vast portal of private communication and then exclude one subset of disfavored speech using a wildly imperfect, content-based screen. The district court's undisputed findings - largely ignored by the Government - establish that filtering software inevitably blocks access to a tremendous amount of fully protected Internet expression. CIPA's broad filtering mandate is particularly egregious, given the availability of numerous effective, less-restrictive alternatives for managing public library Internet access. And even if, as the Government argues, libraries have discretion to choose how to provide public Internet access based on their particular local circumstances and needs, CIPA's nationwide filtering directive is still unconstitutional. The First Amendment prevents Congress from using funding conditions to coerce local libraries to adopt a one-size-fits-all scheme far more restrictive than the one most libraries, on their own, would decide to implement.

STATEMENT

A. Statutory Framework and Legislative History

1. CIPA imposes a new set of conditions on two federal funding programs for Internet connections in public libraries. One, the FCC-administered "universal service" or "E-rate" program, provides libraries and schools with discounted rates for access to telecommunications services, including high-speed Internet access and internal network connections. The overarching goal of the universal service program is to spread the benefits

of advanced telecommunications services to people with low incomes and those in remote areas. *See* 47 U.S.C. § 254(b)(2), (3). The FCC allocates funding to libraries using objective criteria related to the populations they serve. *See* 47 C.F.R. § 54.505(b). Prior to CIPA's enactment, the E-rate discount scheme imposed no conditions on the content of Internet access offered by recipients.

CIPA also modifies the Library Services and Technology Act of 1996, 20 U.S.C. §§ 9121 *et seq.* (LSTA), adding a comparable condition to the LSTA's Grants to States program, which funds state library administrative agencies according to a population-based formula. The state library agencies use those funds in a variety of ways, including paying the costs of local library Internet access, improving linkages among libraries, and improving information access and services, particularly in low-income, underserved, and rural communities. *Id.* § 9141(a). Before CIPA, the LSTA set no limitations on the content of Internet access funded by the Grants to States program.

2. CIPA requires a public library[1] accepting federal funds for Internet access to install and use content blocking software on "any of its computers with Internet access," "during any use of such computers." 47 U.S.C. § 254(h)(6)(B), (C) (for E-rate); 20 U.S.C. § 9134(f)(1)(A), (B) (for LSTA). Recipient libraries must certify that the blocking software "protects against access . . . to visual depictions" that are "obscene" or "child pornography." 47 U.S.C. § 254(h)(6)(C); 20 U.S.C. § 9134(f)(1)(B). In addition, CIPA requires libraries to certify that, during Internet use by minors,[2] the software also "protects against access . . . to visual depictions" that are "harmful to minors." 47 U.S.C. § 254(h)(6)(B);

[1] Plaintiffs did not challenge, and the district court did not address, CIPA's restrictions on public school Internet funding.

[2] CIPA contains no exceptions for parental permission. The additional restrictions on minors' access apply even if a minor's parents wish to allow, or even encourage, broader access.

20 U.S.C. § 9134(f)(1)(A).[3] CIPA's blocking requirements thus extend to *all* of a library's computers, including those not subsidized by federal funds. They also extend to Internet use by library staff. *See In re Federal-State Joint Board on Universal Service*, 16 F.C.C.R. 8182, ¶ 30 (2001).

CIPA contains several disabling provisions that permit libraries to disable the software "to enable access for bona fide research or other lawful purposes." 47 U.S.C. § 254(h)(6)(D); 20 U.S.C. § 9134(f)(3). The Act, however, does not *require* libraries to disable under those circumstances, nor does it define or provide any additional guidance explaining the terms "bona fide research" or "other lawful purposes."[4]

3. Despite the clear applicability of CIPA's funding conditions to adult patrons and staff, the legislative history of CIPA, like the Act's name, focused almost exclusively on the protection of minors. *See, e.g.*, S. Rep. No. 106-141, at 1 (1999); *id.* at 7. Indeed, the Senate Report dismissed the acknowledged First Amendment concerns over Internet filtering by focusing on the fact that the bill, at the time, required filtering "only while a computer is in use by a minor." *Id.*

Congress also was aware of less restrictive means for furthering the interest in protecting minors. During earlier consideration of CIPA in 1999, Congress debated an alternative scheme, the Neighborhood Children's Internet Protection Act (NCIPA), H.R. 4577, amend. no. 3635, 106th Cong.; 146 Cong. Rec. S5823-07, S5842 (June 27, 2000), which was specifically geared toward children. In its original form, NCIPA would have given

[3] CIPA incorporates the preexisting definitions of "obscene" and "child pornography" in the criminal code. 47 U.S.C. § 254(h)(7)(E), (F); 20 U.S.C. § 9134(f)(7)(A), (D). CIPA's definition of "harmful to minors" is similar to many state harmful to minors statutes. 47 U.S.C. § 254(h)(7)(G); 20 U.S.C. § 9134(f)(7)(B).

[4] CIPA irrationally contains two distinct disabling provisions, one applicable to E-rate funding and another to LSTA funds. The former applies only "during use by an adult," 47 U.S.C. § 254(h)(6)(D), while the latter covers Internet use by both minors and adults, 20 U.S.C. § 9134(f)(3). The Government has never attempted to reconcile these two provisions.

libraries two ways to qualify for library Internet subsidies: either implement a comprehensive plan to prevent children from accessing harmful material on the Internet, or purchase the filtering technology now required by CIPA. *Id.* § 602(a)(2); 146 Cong. Rec. at S5843. Libraries choosing the former method would have enjoyed full discretion to develop their own standards regarding what matter is inappropriate for minors; federal agencies would have had no authority to review those determinations. *Id.* § 602(a)(3).[5] Although Congress eventually passed a version of NCIPA, 47 U.S.C. § 254(l), libraries receiving E-rate discounts may not choose between CIPA and the more permissive NCIPA; they must comply with both.[6]

In rejecting less restrictive alternatives to mandatory filtering for all patrons, Congress had no evidence that blocking software works as advertised, let alone as CIPA seems to assume. In fact, the only federally sanctioned study of blocking software at the time – a report by the federal Commission on Child Online Protection – declined to endorse the mandatory use of blocking software, concluding that "no single technology or method will effectively protect children from harmful material online." COPA Commission Report, Oct. 20, 2000, at 9; *see also, e.g., id.* at 19-20,

[5] The bill's sponsor, Senator Santorum, explained that NCIPA would have avoided having "Washington come down and hammer [local governments] and say here is what you have to do," while permitting "[l]ocal parents and teachers and community [to] bring the community together and do that hard work of democracy, which is to work together to come up with the solution to the problem." 146 Cong. Rec. at S5843 (statement of Sen. Santorum).

[6] Under NCIPA as enacted, libraries covered by CIPA must also adopt and implement an Internet safety policy that addresses, among other things, "access by minors to inappropriate matter on the Internet"; "the safety and security of minors" when using email, chat rooms, etc.; and "measures designed to restrict minors' access to materials harmful to minors." 47 U.S.C. § 254(l)(1). Pursuant to NCIPA, "[a] determination regarding what matter is inappropriate for minors shall be made by the . . . library . . . . No agency or instrumentality of the United States government may – (A) establish criteria for making such determination; (B) review the determination made by the certifying [entity] . . .; or (C) consider the criteria employed by the certifying [entity] . . . ." *Id.* § 254(l)(2).

21, 22 (concluding that blocking technology raises "First Amendment concerns because of its potential to be over-inclusive in blocking content," and that "[c]oncerns are increased because the extent of blocking is often unclear and not disclosed"). Moreover, Congress in CIPA mandated that the National Telecommunications and Information Administration *begin* evaluating blocking software eighteen months *after* the enactment of CIPA. *See* CIPA, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-336, § 1703.

B. The District Court's Factual Findings

Two sets of plaintiffs brought facial challenges to CIPA in the U.S. District Court for the Eastern District of Pennsylvania. A three-judge district court consolidated the cases and held a two-week bench trial. After hearing from twenty witnesses and considering voluminous exhibits and trial stipulations, the court ruled on May 31, 2002 that CIPA is facially unconstitutional. In its nearly 200-page decision, the court made extensive findings of fact that, although not challenged by the Government, are largely ignored in its opening brief.

1. *The role of the public library.* The district court found that the mission of public libraries is "to provide patrons with a wide range of information and ideas." J.S. App. 32a; *id.* 33a. To advance this broad mission, libraries serve their patrons' informational needs for "recreational, professional, and other purposes." *Id.* 33a. Public libraries adhere to principles of intellectual freedom and broad, unfettered access to information. In that regard, "public libraries across the country have endorsed the American Library Association's ('ALA') 'Library Bill of Rights' and/or 'Freedom to Read Statement,' including every library testifying on behalf of the defendants in this case." *Id.* 32a. Those policy statements reflect the traditional views of the library profession, including the notion that "[i]t is the responsibility of . . . librarians . . . to contest encroachments upon th[e] freedom [to read] by individuals or groups seeking to impose their own standards or tastes upon the community at large." *Id.* 33a.

When selecting print, audio, video, and other materials for their physical collections, libraries are generally guided by "the needs and interests of their patrons," and by collection development policies created with input from the library's community. *Id.* 35a. Physical collection development is essentially a local task, performed by trained library professionals with an understanding both of librarianship principles and of the community. In serving the informational needs of the local public, libraries "do not generally delegate their selection decisions to parties outside of the public library or its governing body." *Id.*[7]

Although public libraries cannot and do not carry every available item in their physical collections, they will try, consistent with their broad informational mission, to acquire for patrons materials located elsewhere "through the use of bibliographic access tools and interlibrary loan programs." *Id.* 34a. Indeed, "[p]ublic libraries typically will assist patrons in obtaining access to *all materials except those that are illegal, even if they do not collect those materials in their physical collection*." *Id.* (emphasis added).[8]

2. *The Internet in the public library.* The district court also made extensive factual findings about the provision of Internet access in public libraries. Because of its unique and boundless diversity, the Internet perfectly complements the library's core mission, and "vastly expands the amount of information available

[7] Even within the "limited exception" of "the use of third-party vendors or approval plans to acquire print and video resources," the "vendors provide materials based on the library's description of its collection development criteria." J.S. App. 35a. And "[e]ven in this arrangement, . . . the librarians still retain ultimate control over their collection development and review all of the materials that enter their library's collection." *Id.*

[8] Although the Government repeatedly cites to its library experts' reports to support its view of the mission of public libraries, U.S. Br. at 17, 18, 19, 23, those witnesses readily conceded at trial that *libraries should facilitate access to all lawful speech. See* J.A. 290 (testimony of Donald Davis) (agreeing that "the library has a professional duty to provide access to materials that are not illegal"); J.A. 266 (testimony of Blaise Cronin) (Internet filtering in libraries should not "be employed to block access by adults to web sites that are perfectly legal for them to view").

to patrons of public libraries." *Id.* 36a. As of the year 2000, about 95% of libraries in the United States provided Internet access to the public. *Id.* "Of the 143 million Americans using the Internet, approximately 10%, or 14.3 million people, access the Internet at a public library." *Id.* Public funding, including E-rate discounts and LSTA grants, contributes to the broad availability of Internet access in public libraries, *id.*, and is crucial to libraries serving low-income areas. "Approximately 70% of libraries serving communities with poverty levels in excess of 40% receive E-rate discounts." *Id.* 37a.

Libraries provide Internet access to many Americans without alternate means of access. *Id.* 36a. Library Internet use is especially high, for example, among low-income families. *Id.*[9] "By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access." *Id.* 130a.

Prior to CIPA's enactment, only 7% of libraries nationwide mandated the use of blocking software for all patrons. *Id.* 45a (citing Library Research Center, Univ. of Ill. Grad. Sch. of Lib. & Info. Sci., *Survey of Internet Access Management in Public Libraries* (June 2000)). The Government proffered several library witnesses at trial in an attempt to defend the reasonableness of mandatory filtering. They supplied anecdotal evidence of patron problems purportedly linked to unfiltered Internet use, but "none . . . presented any systematic records or quantitative comparison of the amount of criminal or otherwise inappropriate behavior

[9] "About 20.3% of Internet users with household family income of less than $15,000 per year use public libraries for Internet access." J.S. App. 36a-37a. Internet use in public libraries also varies by race and ethnicity, with use by Blacks and Hispanics exceeding that of Asian Americans and Whites. *See* PX 56, National Telecommunications and Information Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet*, at 40 (Feb. 2002). Racial and ethnic minorities, low-income persons, the less-educated, single people, and children of single-parent households are less likely to have home Internet access. *See id.* at 40-41.

that occurred in their libraries before they began using Internet filtering software compared to the amount that happened after they installed the software." *Id.* 41a; *see also id.* 146a. This is important because, as the district court recognized, "public libraries are public places, [and] incidents involving inappropriate behavior in libraries (sexual and otherwise) existed long before libraries provided access to the Internet." *Id.* 41a; *also id.* 146a.

Moreover, not one of the Government's library witnesses tried to use all, or even most, of the less restrictive alternatives for managing Internet use. In particular, none of the libraries experimented with optional, rather than mandatory, filtering. In addition, because "[n]one of these libraries makes differential unblocking decisions based on the patrons' age, . . . [u]nblocking decisions even for adults are usually based on suitability of the Web site for minors." *Id.* 47a. Finally, although the Government's witnesses claimed they stood ready to "unblock" erroneously blocked Web sites, the district court found that case-by-case disabling does not undo the harms caused by mandatory filtering, because "many patrons are reluctant or unwilling to ask librarians to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic." *Id.* 47a; *see also id.* 13a, 46a-48a, 172a-74a.[10]

As several of plaintiffs' librarian witnesses confirmed, the 93% of libraries that do not require all patrons to use blocking software have adopted various policies to ensure that patron Internet access is open, safe, positive, and effective. Instead of mandatory filtering, those libraries have taken a number of less

[10] Even where disabling requests can be made anonymously, patrons typically are disinclined to ask that sites be unblocked. J.S. App. 47a-48a. In addition, because of the way blocking software works, a patron cannot view a blocked site to determine whether to request unblocking. *Id.* 52a-53a. Finally, the unblocking process takes an inordinate amount of time. "Indeed, a patron's time spent requesting access to an erroneously blocked Web site and checking to determine whether access was eventually granted is likely to exceed the amount of time the patron would have actually spent viewing the site, had the site not been erroneously blocked." *Id.* 174a.

restrictive steps to regulate patron Internet use, including: optional filtering, *id.* 45a, 165a; filtering only of minors' access, with or without the possibility of parental override, *id.* 162a-63a; using privacy screens or recessed monitors to prevent passers-by from inadvertent viewing of unwanted material, *id.* 37a, 43a-45a, 166a; segregating Internet terminals, *id.* 165a; providing Internet training and education to patrons, *id.* 41a; and the enforcement of Internet use policies prohibiting access to illegal materials, *id.* 158a-60a. *See also* J.A. 381-83, 414-15 (PX 29) (ALA publication describing alternatives to filtering).

3. *Ineffectiveness of filtering software.* The district court heard testimony from several expert witnesses, including the Government's own experts, who examined the effectiveness of filtering software. Based on this evidence, the district court found that filtering software is an inherently crude tool that both "underblocks," in that it fails to block a substantial number of targeted sites, and "overblocks," in that it blocks an enormous amount of constitutionally protected speech on the Internet, including much that is not sexually explicit at all. *See* J.S. App. 6a-7a, 58a, 68a, 79a, 90a-94a. The problems with overblocking are particularly significant. Because filters block according to content categories that are far broader than those proscribed by CIPA, the software necessarily would block a substantial amount of protected speech even if it worked with perfect accuracy. *Id.* 11a, 51a. Moreover, as the district court found, filters routinely block an enormous amount of content that does not meet even their own category definitions. *Id.* 72a-73a, 91a, 93a-94a.

a. *Filters are not tailored to CIPA or to the mission of a public library.* The Government does not dispute that blocking software is the only real option available to libraries seeking to comply with CIPA. Blocking software prevents a user from viewing any Web page on a preset block list. *Id.* 48a-49a, 52a. The block lists group Web pages into a wide range of content categories such as "Nudity," "Alcohol," "Sex," "Swimsuits," "Tasteless/Gross," and "Travel." *Id.* 49a-51a. Customers can choose particular content categories to enable. *Id.* 49a.

Filters are ill-suited to the task of blocking library patrons from viewing only the images prohibited by CIPA. Although CIPA requires libraries to protect against access only to "visual depictions," filters block both images and text. *See id.* 56a. There is no judicial involvement in the blocking software companies' decisions about which Web sites to block, and these companies make no attempt to conform their decisions to the legal definitions of speech that is obscene, child pornography, or harmful to minors, or to take into account local community standards in making these determinations. *Id.* 51a, 60a-61a. Therefore, to comply with CIPA, a library must select a filtering software category that blocks a broad range of constitutionally protected text and images that are not prohibited by the Act. *Id.* 49a-51a. Further, because the software does not differentiate adult use from use by minors, it inevitably blocks an additional large quantity of speech that is fully protected as to adults. *Id.* 6a.

A library that installs blocking software, moreover, has no way of knowing which sites will be blocked. The filter companies consider their control lists to be proprietary, and customers are not allowed access to them. *Id.* 52a-53a. As a result, the only way for a library administrator to know whether a particular site will be blocked is through individual trial and error. *Id.* 53a. Having discovered a wrongly blocked page, it is possible for a filter customer to remove the page from the control list, but the override must be done manually. *Id.* 52a. Because of the secrecy of the block lists and the vast size of the Internet, it is inevitable that the blocking software will operate in practice largely free of any application of the professional judgment of librarians to particular sites.

b. *Blocking software's inherent problems of overblocking and underblocking.* As the district court found, blocking software is plagued by underblocking and overblocking errors that result from the software companies' inability to keep up with the size and rapid growth of the Web. It is estimated that the Web has over 2 billion publicly accessible pages, and is growing at a rate

of about 1.5 million new pages per day. *Id.* 30a.[11] These numbers, moreover, represent only the pages that theoretically can be reached by standard search engines; there are an estimated two to ten times as many Web pages that cannot be located by such tools (but can be found by typing in the pages' specific Web addresses). *Id.* 31a. Faced with such an enormous universe of material, filtering companies locate and categorize only a fraction of the Web. *Id.* 55a-56a, 91a. As a result, blocking software will fail to block many Web pages that might fall within CIPA's definitions. *Id.* 56a, 58a, 90a-91a.

In addition to underblocking, filtering companies employ a number of techniques that result in overblocking. These companies use automated classification tools that contribute to erroneous overblocks of Web sites. *See id.* 59a-60a. And although the major filtering companies purport to have their employees review most of the sites "harvested" from the Web, "[g]iven the speed at which human reviewers must work to keep up with even a fraction of the approximately 1.5 million pages added to the publicly indexable Web each day, human error is inevitable." *Id.* Once a site is reviewed, moreover, it is rarely re-reviewed in the future, because filtering companies re-review categorization decisions only upon individual request. *Id.* 53a. "This necessarily results in both over- and underblocking, because . . . the content of Web pages and Web sites changes relatively rapidly." *Id.* 65a.

Because it is impossible for their staff to review every single harvested Web *page*, blocking software companies "widely engage in the practice of categorizing entire Web sites at the 'root URL,' rather than engaging in a more fine-grained analysis of the individual pages within a Web site." *Id.* 61a.[12] In other words,

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[11] Many of blocking software's inherent flaws stem from the architectural peculiarities of the Internet., which the district court described in detail in its opinion. *See* J.S. App. 25a-28a.

[12] The URL, or Uniform Resource Locator, is "an address that points to some resource located on a Web server that is accessible over the Internet," and may be a numeric Internet Protocol (IP) address or an

if a site with hundreds of pages includes even a few pages that ostensibly meet the filtering company's content categories, the company will block the entire site. *Id.* 92a. Similarly, filters will block an IP address entirely, even if the Web server with which that address is associated hosts multiple (and in some cases, thousands) of distinct Web sites. *Id.* 62a. Further, because of particular architectural properties of the Web, filters block entire categories of Web sites containing valuable information – such as sites that allow the user to visit other Web sites anonymously, sites that provide language translation services, and "cache" sites of archived Web pages. *Id.* 62a-64a. These sites provide important services to users, but they are a problem for filter companies because they allow users to access content without the use of URLs that may be on the blocking lists.

The district court found that the Government's *own* expert study of the use of blocking software in three libraries showed an overblocking rate of 6% to 15% – *i.e.*, 6% to 15% of the Web sites that patrons tried to access but were blocked did not meet the filtering companies' own category definitions. *See id.* 72a-73a, 78a-79a.[13] Based on the findings of both the Government's and the plaintiffs' experts, the district court concluded:

> At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies' own category definitions. Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as "pornography" or "sex."
>
> The number of overblocked sites is of course much higher

alphanumeric address. J.S. App. 26a-27a.

[13] Because of the numerous methodological flaws associated with the Government's expert study, the district court concluded that its finding of 6% - 15% overblocking rates "cannot be considered as anything more than minimum estimates of the rates of overblocking that happens in all filtering programs." J.S. App. 79a.

> with respect to the definitions of obscenity and child pornography that CIPA employs for adults, since the filtering products' category definitions, such as "sex" and "nudity," encompass vast amounts of Web pages that are neither child pornography nor obscene.

Id. 93a.[14]

Especially pernicious is blocking software's disproportionate effect on sites dealing with sensitive sexual issues, such as sexual health and gay and lesbian sites. The district court found that "filtering software blocks large quantities of . . . information about health and sexuality that adults and teenagers seek on the Web." *Id.* 3a-4a. Indeed, a recent study cited in the Government's brief found that filters disproportionately overblocked sites dealing with sexual health and gay health issues. According to that study, "[a]t the least restrictive setting, where products were supposed to block pornography only, about 10% of nonpornographic health information sites returned from searches using the terms *safe sex*, *condom*, and *gay* were blocked, while for most other searches less than 1% of health sites were blocked." Carolyn R. Richardson et al., *Does Pornography-Blocking Software Block Access to Health*

[14] The thousands of Web pages that the district court found "no rational person could conclude match[] the filtering companies' category definitions," J.S. App. 93a, are too numerous to list here, but include, for example: "Orphanage Emmanuel, a Christian orphanage in Honduras that houses 225 children," blocked by Cyber Patrol in the "Adult/Sexually Explicit" category; "Vision Art Online, which sells wooden wall hangings for the home that contain prayers, passages from the Bible, and images of the Star of David," blocked in Websense's "Sex" category; "the home page of the Lesbian and Gay Havurah of the Long Beach, California Jewish Community Center," blocked by N2H2 as "Adults Only, Pornography," and by Smartfilter and Websense as "Sex"; "the Web site for Bob Coughlin, a town selectman in Dedham, Massachusetts," blocked under N2H2's "Nudity" category; "the Web site for Wisconsin Right to Life," blocked by N2H2 as "Nudity"; "the Western Amputee Support Alliance Home Page," blocked by N2H2 as "Pornography"; and "a site dealing with halitosis," blocked by N2H2 as "Adults, Pornography," by Smartfilter as "Sex," by Cyber Patrol as "Adult/Sexually Explicit," and by Websense as "Adult Content." *Id.* 86a-89a.

Information on the Internet?, 288 JAMA 2887, 2891 (2002).[15]

The district court also found significant evidence of underblocking. J.S. App. 3a, 7a, 11a, 56a, 67a. That blocking software regularly fails to catch all sexually explicit Internet material was confirmed by the Government's experts, *e.g.*, *id.* 74a-75a, and library witnesses, who testified to incidents of underblocking even after installing blocking products on their computers, *id.* 77a.

The problems with filters are not simply short-term glitches that will be solved by technological advances, as the Government suggests. *See* U.S. Br. at 5. As plaintiffs' expert Dr. Geoffrey Nunberg explained, the flaws identified with blocking software inhere in the nature of the Web and the necessary tradeoff between the goals of blocking as much content as possible (to prevent underblocking) and correctly categorizing the content of individual Web pages (to prevent overblocking). Relying on Dr. Nunberg's testimony, the district court concluded:

> [I]t is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech. The more effective a filter is at blocking Web sites in a given category, the more the filter will necessarily overblock. Any filter that is reasonably effective in preventing users from accessing sexually explicit content on the Web will necessarily block substantial amounts of non-sexually explicit speech.

J.S. App. 68a.

SUMMARY OF ARGUMENT

I. The district court correctly held that CIPA is an unconstitutional exercise of Congress's spending power because it requires public libraries, as a condition of receiving federal

[15] Studies chronicling filters' shortcomings have noted the tendency of blocking software to block sexual health and gay and lesbian sites. *See* PX 82 App. Vol. 1, Tab 3, at 36 (Expert Report of Christopher Hunter).

Internet funding, to engage in conduct that would violate the First Amendment. Congress demanded in CIPA that libraries providing Internet access install filtering software that the district court found would block far more than the unlawful, unprotected expression specified in the statute – including a large number of Web sites that are not sexually explicit in any way. A library complying with that mandate would be imposing a content-based restriction on a medium of communication that is otherwise open for use by patrons to access information on an unlimited number of topics. Such selective censorship of protected speech by a state actor runs afoul of the First Amendment.

A. Knowing it cannot justify CIPA if the speech restrictions it mandates trigger strict scrutiny, the Government devotes the bulk of its argument to attempting to avoid such exacting review. But that effort is unavailing. Internet access in a public library constitutes the paradigm of a "designated public forum" from which the state may not exclude one disfavored category of speech based on its content. Library patrons who use the Internet have access to a vast panorama of information, and decide for themselves where to go in cyberspace and why. Given that reality, a library's use of software designed to exclude one particular category of protected speech is constitutionally suspect.

That the Internet terminals at issue are located in a public library in no way justifies a different constitutional analysis. A library, after all, is an institution that exists to enable private citizens to access whatever information they may seek. The library's mission is fundamentally inconsistent with a decision to prevent patron access to otherwise available expression. Nor is there any valid analogy between filtering Internet access and the inevitable content-based choices a library makes when it acquires materials for its physical collection. With the provision of Internet access, the library opens up a portal to a huge amount of communication, much of which would never be purchased for inclusion in a physical collection. It cannot then sever access to a limited class of that universe – relying entirely on the secret decisionmaking of third-parties – and claim that this is akin to

classic physical collection development.

B. The district court correctly held that installation of blocking software cannot be justified under the applicable strict scrutiny. Internet filters inevitably block access to many thousands of Web sites that do not meet the software companies' own definitions, let alone those set forth in CIPA. To the extent that the Government's purpose in the Act is to mitigate behavior problems that arise when patrons access sexually explicit sites, that purpose is insufficient in principle. The government may not censor speech in order to affect conduct. A second asserted interest – in preventing patrons from accessing illegal speech – may be viewed as compelling, but it cannot justify blocking a large amount of speech that is legal and constitutionally protected. The state may not censor protected speech in order to suppress unprotected speech. Finally, as to the Government's claimed interest in protecting other library users from inadvertent exposure to sexually explicit images, the district court found as a fact that there are other less restrictive means of serving this interest – means that have been tried and tested by the 93% of libraries that were not requiring use of blocking software for all patrons prior to CIPA's enactment.

II. Even if the Government were correct that individual public libraries have the constitutional authority to make "editorial judgments" about the Internet content made available to patrons, that still would not justify CIPA. In essence, the Act is an effort to coerce libraries to make the particular judgment on that issue that Congress favors, even if libraries, on their own, would adopt a less restrictive approach. Through CIPA, Congress effectively cuts off patrons from a category of speech, defined by its content, without any knowledge of the particular local circumstances that might or might not lead a library to make that choice. Such a law unconstitutionally restricts the freedom of speech protected by the First Amendment, regardless of whether the direct recipients of the federal funds – libraries – themselves have First Amendment rights. In any event, if the Court reaches the question, it should recognize that the First Amendment does

not give the federal government free rein to censor the content of expression favored by local municipal entities.

ARGUMENT

Although the Government asks this Court to withhold any form of heightened constitutional scrutiny in this case, that request cannot be taken seriously. In CIPA, Congress sought to prevent private citizens from accessing particular expressive works of other private citizens, because Congress believed that the communicative impact of that speech would negatively affect those seeking it out on the Internet and others passing nearby. Such a law raises core First Amendment concerns, particularly when it leads to the suppression of vast amounts of fully protected expression. The First Amendment prohibits public libraries from restricting speech on such a basis, and prevents Congress from using its spending power to induce them to do so.

I. CIPA INDUCES UNCONSTITUTIONAL SPEECH RESTRICTIONS ON INTERNET ACCESS IN PUBLIC LIBRARIES.

CIPA cannot be sustained as a valid exercise of Congress's spending power because it induces libraries that receive Internet funding to violate the First Amendment rights of their patrons. As the Government concedes, U.S. Br. at 16, when Congress distributes funds to state and local governments, it cannot do so in a way that "induces [those entities] to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). CIPA requires libraries that accept funds to impose a content-based restriction on a public forum – Internet access in public libraries – that is otherwise open to communication, on a virtually infinite number of topics, between library patrons and any persons who have chosen to create Web sites. A library's decision to impose such a content-based restriction triggers strict scrutiny – and thus could be justified only by proof that the restriction is narrowly tailored to serve a compelling interest in the least restrictive manner possible.

A funding condition demanding such presumptively

unconstitutional conduct would be permissible under *Dole* only if the Government could demonstrate that the applicable strict scrutiny is satisfied in most, if not all, instances.[16] But the Government knows that it cannot make such a showing. Its purported justifications, even taken at face value, depend on local conditions and circumstances – yet the facts show that 93% of the nation's libraries, when left free to make the decision about whether to install mandatory blocking software, have chosen not to do so and have found less restrictive measures to be equally effective in addressing the governmental interests at stake.

Thus, the Government, in attempting to show that CIPA is consistent with *Dole*, relies almost exclusively on the argument that mandatory filtering of the Internet in libraries does not warrant any heightened scrutiny under the First Amendment. It draws an analogy to librarians' everyday judgments about the contents of their libraries' physical collections and asserts that to apply heightened scrutiny here would threaten local libraries' "responsibility for the resources that they collect and make available to their local communities." U.S. Br. at 19. That argument is ironic, because the Government is defending a federal condition designed to motivate libraries *not* to follow the professional judgment of their librarians about the best ways to manage public Internet access. *See* Point II *infra*. And it is also incorrect. Heightened scrutiny must apply where, as here,

[16] Unlike in the district court, the Government no longer claims that it can avoid CIPA's facial invalidation by showing that a single library could constitutionally comply with the funding restrictions. That change of course is understandable. The principle that a law attacked facially must be invalid in all applications does not apply to cases under the First Amendment. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (a law "is unconstitutional on its face if it prohibits a substantial amount of protected expression"); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In any event, it makes no sense to read *Dole* as allowing funding conditions that trigger strict scrutiny and are usually, if not always, unconstitutional. Under that theory, a statute could validly require municipalities receiving federal funds to employ a specified percentage of African-Americans if at least one town, given its particular history and demography, could constitutionally comply with that quota.

a public institution sets up a portal allowing almost unlimited communication with the outside world, but then excludes a single area of disfavored content, using a grossly imperfect technology that is both overbroad and underinclusive.

A. Libraries Complying with CIPA's Content-Based Restrictions Would Trigger Strict Scrutiny by Excluding Protected Speech from a Forum Dedicated to Free and Open Expression.

CIPA's funding restrictions require libraries to single out for prohibition one type of speech in an otherwise unlimited forum for the exchange of ideas.[17] Indeed, through CIPA, Congress has inflicted a profound double injury upon the First Amendment. Not only does CIPA unduly restrict access to the most diverse, expansive medium ever created, it compounds the problem by regulating that medium in one of the most democratizing, speech-enhancing institutions in America – the public library. By targeting the intersection of these two First Amendment fora, CIPA ultimately weakens both, severely undermining the core constitutional values otherwise promoted by the addition of Internet access as a resource in public libraries.

1. Public libraries that provide their patrons with free access to the Internet open a portal to the nearly unlimited expression available in cyberspace. In so doing, they create a limited public forum devoted to free expression. It is well settled that the government may create a designated or limited public forum by opening up a nontraditional forum for public discourse. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S.

[17] This case fundamentally involves the right of library patrons to receive information on the Internet. The First Amendment undoubtedly encompasses not only the right to speak but also the right to receive information. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating statute because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another"); *Board of Educ. v. Pico*, 457 U.S. 853, 867-68 (1982) (plurality opinion) ("[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them.").

672, 678 (1992) ("*ISKCON*"); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983); *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975); *City of Madison Joint School Dist. v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 174-75 (1976). The test is whether the governmental body has opened a facility to expressive activities that are "'generally available' . . . to a class of speakers." *Forbes*, 523 U.S. at 678 (quoting *Widmar*, 454 U.S. at 264). In determining whether a forum has been designated for public discourse, the Court looks to the nature of the property or medium involved, the manner in which the government has made the forum generally available for speech, and whether the property is consistent with expressive activities. *See, e.g., id.* at 677-78; *ISKCON*, 505 U.S. at 680; *Cornelius*, 473 U.S. at 802-803.

The forum at issue here – Internet access in a public library – lies at the intersection of two institutions devoted to the promotion of First Amendment values. The Internet is a unique, expansive medium for worldwide communication. "While 'surfing' the World Wide Web . . . individuals can access material about topics ranging from aardvarks to Zoroastrianism." *Ashcroft v. ACLU*, 122 S. Ct. 1700, 1703 (2002). As the Court recognized in *Reno v. ACLU*, 521 U.S. 844 (1997), expression on the Internet is "as diverse as human thought," *id.* at 870, and "is thus comparable, from the reader's viewpoint, to . . . a vast library including millions of readily available and indexed publications," *id.* at 853. The Internet presents low entry barriers, allowing almost anyone to communicate with a worldwide audience. J.S. App. 25a. Currently, at least 400 million people use the Internet worldwide, including over 143 million Americans. *Id.* Given the virtually boundless potential of expression on the Internet, "[t]his dynamic, multifaceted category of communication" is entitled to the highest level of First Amendment protection, without qualification. *Reno*, 521 U.S. at 870, 872.

Providing Internet connections in public libraries, far from

lowering First Amendment protections, only serves to heighten them. The Court's analogy between the Internet and a "vast library" in *Reno* is hardly accidental. The public library by its very nature serves as a forum for the communication and receipt of information and the free exchange of ideas. Indeed, the public library is "designed for freewheeling inquiry." *Board of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting). "As such, the library is a 'mighty resource in the free marketplace of ideas.'" J.S. App. 128a (quoting *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976)); *see also, e.g., Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992) (public library is "the quintessential locus of the receipt of information"). As much as any institution, the public library has safeguarded the vital First Amendment right to receive speech and expression. In defining its purpose as information-provider, the public library historically has offered a wide and diverse range of expression to the public and has prohibited exclusion of materials based on disfavored content or viewpoints.[18] Thus, the vast majority of public libraries across the country, including those represented by the Government's library witnesses at trial, have endorsed the ALA's Library Bill of Rights and the Freedom to Read Statement, which state that library materials "should not be proscribed or removed because of partisan or doctrinal disapproval," and which affirm the public library's mission to provide materials "for the interest, information, and enlightenment of all people of the community the library serves," and to "make available the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority." J.S. App. 32a-33a.

Internet access in the public library thus readily qualifies

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[18] Indeed, a number of lower courts have concluded that public libraries are limited public fora. *See, e.g., Kreimer*, 958 F.2d at 1259; *Neinast v. Board of Trs. of Columbus Metro. Library*, 190 F. Supp. 2d 1040, 1043-44 (S.D. Ohio 2002); *Armstrong v. District of Columbia Pub. Library*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000); *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998).

as a designated public forum. In providing Internet access to its patrons, the public library greatly furthers its speech-disseminating mission. But having opened up a portal to a virtually unlimited number of speakers on a virtually unlimited number of topics, a library is not free to exclude a disfavored category of protected speech, identified based on its content, without satisfying strict scrutiny. *See Forbes*, 523 U.S. at 677 ("If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."); *ISKCON*, 505 U.S. at 678 (regulation of a designated public forum is "subject to the same limitations as that governing a traditional public forum") (plurality opinion); *Perry*, 460 U.S. at 45-46 (once a government has opened up a forum for expressive activity, it may not exclude certain types of content without satisfying strict scrutiny).[19]

2. The Government argues that a public library is free to censor categories of protected speech when it provides Internet access, because libraries traditionally and inevitably exercise editorial discretion over print and other materials they provide to their patrons. That argument has no merit. To begin with, the Government paints an inaccurate picture of the traditional role and mission of the public library. The mission of libraries in America has not been to provide only those materials that librarians deem "worthwhile" and "appropriate" for their patrons. *See* U.S. Br. at 18-19, 22-24. Certainly, librarians make professional judgments about quality and diverse coverage in determining which books to collect. J.S. App. 34a-35a. To that end, librarians are trained to assess the merits of a particular work based on a variety of criteria, and sometimes rely on professional selection aids such as review journals and bibliographies in making their

[19] This Court's public forum cases have repeatedly stated that exclusions in a designated or limited public forum are subject to strict scrutiny. *See, e.g., Forbes*, 523 U.S. at 677. The Government confuses the public forum doctrine when it suggests that the applicable standard of review is not strict scrutiny, but one of reasonableness and viewpoint neutrality. That standard applies to a *non*public forum, not one that has been generally dedicated to speech activities. *See id.*

acquisition decisions. *Id.* 35a, 122a-123a. But librarians are equally responsive to community demand, and will collect popular materials regardless of whether they are "educational" or "worthwhile." *Id.* 33a. This tradition of allowing *patrons* to decide what to read is best illustrated by interlibrary loan, through which libraries will provide patrons with materials even if those materials are not in their own collection. *Id.* 34a.

The Government's theory that libraries will allow patrons to access only those materials they deem "worthwhile" or "appropriate" cannot be squared with this longstanding practice. Indeed, the Government's own expert witnesses conceded that libraries should provide adult patrons with *any* legal materials, even if they deemed those materials to be inappropriate. *See* J.A. 290 (testimony of Donald Davis) (agreeing that "the library has a professional duty to provide access to materials that are not illegal"); J.A. 266 (testimony of Blaise Cronin) (Internet filtering in libraries should not "be employed to block access by adults to web sites that are perfectly legal for them to view"); *id.* 267 (same). Therefore, in selecting even their physical collection, public libraries do not engage in the degree of editorial discretion that renders forum analysis inapplicable to public broadcasters or arts funding.[20]

[20] The Government's reliance on *NEA v. Finley*, 524 U.S. 569 (1998), and *Forbes* is therefore misplaced. *Finley* involved arts funding, which as the Court observed is different from other subsidies because in funding the arts, "the Government does not indiscriminately 'encourage a diversity of views from private speakers.'" 524 U.S. at 586 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995)). In *Finley*, the Court noted that "[t]he NEA's mandate is to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger* . . . and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater." *Id.* (citing *Lambs Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993), and *Conrad*, 420 U.S. at 555). Similarly, the Court in *Forbes* held that "[m]uch like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others." 523 U.S. at 674-75. The public library, by contrast, does not prescribe a

In any event, the analogy between library collection development decisionmaking and use of mandatory blocking software on Internet terminals is utterly inapt. At the outset, there is no reason even to consider libraries' physical collections in deciding how the First Amendment applies to the Internet in libraries. The relevant forum is Internet access in the public library - not, as the Government suggests, the public library generally.[21] Further, if physical collections are to be considered, the inherent differences between books and the Internet must be considered as well.

The first and most obvious difference is that the materials made available to patrons on the Internet - with or without the installation of blocking software - are not selected by librarians. It is spurious for the Government to suggest that any library has a "collection of material from the Internet," U.S. Br. at 22, developed pursuant to its "Internet collection decisions," *id.* at 24. By offering even filtered Internet access, libraries necessarily enable patrons to access innumerable Web sites containing material that no librarian has selected and that no librarian would select for their physical collections. J.S. App. 121a, 123a-125a. As a result, libraries that offer Internet access simply cannot be

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curriculum - as the Government seems to think - but rather attempts to provide the fullest array of materials and let its patrons decide what to read.

[21] Public forum analysis focuses on the specific property or medium to which the speaker - or, in this instance, the recipient of speech - seeks access. *See Cornelius*, 473 U.S. at 801 ("[O]ur cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property."); *Perry*, 460 U.S. at 44 (forum characteristics "differ depending on the character of the property at issue"). Because CIPA implicates library patrons' receipt of information over the Internet, that is the relevant forum, not the public library generally. *See Cornelius*, 473 U.S. at 801-02 (rejecting argument by United States that the relevant forum was the federal workplace generally, and that the federal charity drive was "merely an activity that takes place in the federal workplace"); *Forbes*, 523 U.S. at 675 (holding that "[a]lthough public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine," particular show was subject to forum analysis); *Widmar*, 454 U.S. at 267-68 (relevant forum was meeting facilities, not state university generally).

said to be exercising the type of editorial discretion that applies when they select materials for their physical collection.[22]

Indeed, even if application of a single *exclusion* could be analogized to decisions about *inclusion* in the physical collection, librarians have absolutely no involvement in the blocking decisions made by third-party blocking software companies.[23] Those decisions are made by non-librarians who know nothing of a library's existing physical collections, the communities served by libraries, or the criteria used by librarians in selecting physical materials. In fact, because the software companies treat their blocking lists as proprietary and refuse to provide those lists to customers, *id.* 52a-53a, libraries installing blocking software do not even know what Internet information they are withholding from the public. Blocking software thus is not like the third-party vendors that some libraries use in very limited circumstances, as the Government suggests. *See* U.S. Br. at 26-27. As the district court observed, libraries that use such vendors "still retain ultimate control over their collection development and review all of the materials that enter their library's collection." J.S. App. 35a. The same cannot be said of blocking software.[24]

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[22] To the extent classic collection development principles have any application in the Internet context, it is only through the selection of "recommended sites," which many libraries offer as a means of directing patrons to particularly useful or interesting Internet information. J.S. App. 41a-42a.

[23] Seeking to downplay the fact that CIPA demands exclusion of a single category of content, the Government points to evidence that a few libraries have also screened out other categories of protected speech deemed by filtering companies to be "violent" or "tasteless." U.S. Br. at 23. But multiplying the categories of content-based exclusion does not alter the fundamental fact that the Internet materials available in the public library are not selected individually, and are not limited to any particular content deemed appropriate for a library. As for the fact that some libraries bar use of Internet terminals for game play or "chat," *see id.*, those are not content-based exclusions at all.

[24] The Government's analogy fails for the additional reason that blocking Internet access involves an active, rather than passive exclusion of certain types of content. When a library declines to carry a book in hard copy as part of a necessarily selective acquisition process (given shelf space

It follows that the Government cannot rely on the cases it cites upholding individualized content-based judgments made by governmental entities. Those cases emphasize that the state actor in question is entitled to shape the message it sends by choosing particular speech or speakers. *See supra* note 20. Similarly, the Court's forum cases explain that a nonpublic forum is one in which the government retains discretion to review and select speakers to participate in the forum. *See Forbes*, 523 U.S. at 679 ("[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'" (quoting *Cornelius*, 473 U.S. at 804)); *see also Perry*, 460 U.S. at 47. Libraries do not apply such selective decisionmaking when they provide Internet access, filtered or not. The Government's definition of "editorial discretion" in these circumstances is essentially meaningless.

3. The Government argues that libraries can merely define the forum of Internet access to exclude one type of content – sexually explicit speech – without violating the Constitution. *See* U.S. Br. at 24, 26. Under the public forum doctrine, however, the question is, first, whether a governmental entity has created a designated public forum and then, if so, whether a content-based exclusion from that forum is narrowly tailored to serve a compelling state interest. In attempting to define the forum as excluding the material blocked by libraries that comply with CIPA, the Government stands public forum analysis on its head. Accepting the Government's argument would render *every* restriction on speech in a nontraditional forum permissible, once

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and resource constraints), it conveys no discernable message about the content of that book. When a Web site is blocked on the library's Internet terminals pursuant to a content-based policy, however, the library (through a software company) lets patrons know that it expressly disfavors the site's content. Instead of selection, the blocking of Internet sites mandated by CIPA is akin to a library's purchasing an encyclopedia or a magazine and tearing out or redacting some of its content. *See Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 2 F. Supp. 2d 783, 793-94 (E.D. Va. 1998).

the state describes the forum to incorporate that restriction. But the government cannot recast a content-based exclusion as a mere forum definition, "lest the First Amendment be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001); see also, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 801 (1996) (Kennedy, J., concurring in the judgment) ("If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public fora; every exclusion could be recast as a limitation.").[25] To the contrary, once the government dedicates a forum to a general, speech-promoting use – in this case, the communication and receipt of the broadest spectrum of information – it cannot limit that use by disfavoring certain expression. *See, e.g., Forbes*, 523 U.S. at 677; *Perry*, 460 U.S. at 46; *Widmar*, 454 U.S. at 267-68; *Conrad*, 420 U.S. at 555. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Pico*, 457 U.S. at 866 (plurality opinion) (internal quotation marks omitted).

It is no answer to argue, as the Government does, U.S. Br. at 25-26, that the district court's ruling creates an incentive for libraries not to provide Internet access or not to allow access to anything but a pre-approved list of sites. Such an argument is always available in any public forum case. But the Court has consistently held that, although the government is under no constitutional obligation to create a new form of public forum, "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, 460 U.S. at 46. By providing Internet access, public libraries create a forum open to every topic imaginable, except, if CIPA is applied, sexually explicit speech (and any other expression blocked by filters). This is therefore not a case where the government has limited its property or a

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[25] Under the Government's theory, for example, the government in *Conrad* lawfully could have denied auditorium access to any performance that was not "clean, healthful[] entertainment," as outlined in the auditorium's original dedication. 420 U.S. at 549 & n.4.

means of communication to a particular subject of expression, such as art or classical music. Instead, this case is "more akin to the Government's creation of a band shell in which all types of music might be performed except for rap music." *Denver Area*, 518 U.S. at 802 (Kennedy, J., concurring in the judgment). In such circumstances, strict scrutiny applies.

B. CIPA's Blocking Requirements Are Not a Narrowly Tailored and Least Restrictive Means of Serving a Legitimate and Compelling Governmental Interest.

In order to show that CIPA's blocking requirements satisfy strict scrutiny, the Government must show that (1) they serve a compelling interest, (2) they are narrowly tailored, and (3) no less restrictive means of serving the governmental interest exists. *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). The district court correctly concluded that CIPA's filtering mandate fails this test and therefore is impermissible under *Dole*.

1. *The claimed governmental interests.* The Government has suggested three justifications for a library's decision to prohibit unfiltered Internet access. The first – the claim that mandatory blocking of protected speech serves to reduce inappropriate or criminal behavior in public libraries – was correctly rejected by the district court as improper in principle. As the court held, even assuming that sexually explicit content will motivate some patrons to behave improperly, "the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *see also id.* at 245 ("The prospect of crime . . . by itself does not justify laws suppressing protected speech."); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Rather, the remedy is to prohibit and sanction the misbehavior itself – just as libraries have done throughout their history. *See* J.S. App. 41a (noting that libraries, as public places, have always faced the problem of "inappropriate behavior . . . (sexual and otherwise)"). And even if reducing bad behavior could justify a speech restriction in principle, the Government made no showing, beyond a handful of anecdotes, that the Internet has significantly increased problem behavior

in libraries or that introduction of mandatory filtering has reduced it. *See id.*

The Government also has argued that mandatory filtering serves to prevent patrons from accessing unprotected and unlawful obscenity, child pornography and (for children) harmful-to-minors material. In addition, it has asserted that mandatory filtering addresses the problem of patrons other than the Internet user inadvertently viewing sexually explicit material. The district court accepted that preventing access to illegal speech is a compelling governmental interest. It also agreed, with more hesitancy, that protecting unwilling viewers might under some circumstances constitute a justification for censorship of the Internet in the library. The court properly recognized, however, that reliance on these interests runs afoul of the rest of the strict scrutiny test.

2. *Narrow tailoring.* The requirement of narrow tailoring, in this context, demands that a court give due weight to the problem of "overblocking." As the district court found, based on voluminous evidence, Internet filtering software is a blunt instrument that blocks far more speech than CIPA requires and far more than either of the Government's justifications would warrant. A huge amount of this "overblocked" material is constitutionally protected for everyone. An additional large portion is sexually explicit but non-obscene material that is protected at least for adults.[26] Taken together, these categories suggest that the vast majority of the material blocked by filters is constitutionally protected at least for some patrons.

CIPA's funding conditions, therefore, are not narrowly tailored in the sense of restricting only those types of speech relevant

[26] It is well settled that sexually explicit speech that does not fall within the narrow categories of unprotected expression is entitled to full First Amendment protection. *See, e.g., Free Speech Coalition*, 535 U.S. at 256 (confirming that speech that is neither obscene nor child pornography is protected by the First Amendment); *Reno*, 521 U.S. at 874-75 ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'") (citation omitted).

to each of the governmental interests asserted. First, as to the interest in deterring access to illegal, unprotected speech, as the district court recognized, J.S. App. at 152a-53a, filtering software blocks *much* more speech than necessary to accomplish that goal. It would make a mockery of the requirement of narrow tailoring if the government could bar access to a great deal of protected speech in order to fence off a small amount of unprotected speech. This Court has emphasized that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech." *Free Speech Coalition*, 535 U.S. at 255; *see also, e.g., Playboy*, 529 U.S. at 817-18. "This rule reflects the judgment that '[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. . . .'" J.S. App. at 153a (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).[27]

The second potentially legitimate interest identified by the Government - protection of unwilling bystanders from inadvertent exposure to sexually explicit materials - is, as the district court noted, problematic. Under the First Amendment, the general rule is that speech cannot be censored based on content in order to protect those in the vicinity from offense. The usual solution for protecting sensibilities is "'averting our eyes.'" *Id.* 142a (quoting *Playboy*, 529 U.S. at 813); *see also, e.g., Free Speech Coalition*, 535 U.S. at 245 ("It is also well established that speech

[27] Even regarding the protection of young children from harmful to minors materials, obscenity, or child pornography - arguably the most compelling of the Government's asserted interests - the district court found that filtering software unavoidably blocks vast amounts of speech that is fully protected and appropriate for minors. The Court need not resolve the question whether such blocking of protected speech for children could ever be justified by the interest in screening out harmful and unprotected speech. Even if it could, the district court found that there are ample less restrictive alternatives for protecting children from material they might choose to access - including close adult supervision of terminals available to children, parental choice about filtering, or even a flat rule that children below a suitable age are limited to filtered access. Whether any or all of these options would pass constitutional muster, they certainly are less restrictive than CIPA's broad filtering mandate. *See, e.g., Denver Area*, 518 U.S. at 756.

may not be prohibited because it concerns subjects offending our sensibilities.").[28] And even as to inadvertent exposure of children, this Court has explained that the interest in protecting children from potentially harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults. . . . [T]he Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'" *Reno*, 521 U.S. at 875. "Surely, this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *see also Denver Area*, 518 U.S. at 759; *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 128 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

But even assuming that the library context justifies some limits on access to constitutionally protected but sexually explicit sites in order to protect unwilling bystanders, the evidence at trial made clear that blocking software is not narrowly tailored even to achieving that broader objective. To the contrary, a vast amount of material blocked by the filters is not sexually explicit at all. Thus, a library complying with CIPA would bar patrons from accessing thousands of sites offering fully protected content that would not offend anyone's sensibilities. Many of these blocks are completely random and utterly irrational. But perhaps even more troubling are those that are not - for example, the disproportionately large number of blocks of sexual health and gay and lesbian sites. *See* J.S. App. 3a-4a.[29]

[28] "[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975); *see also, e.g., Cohen v. California*, 403 U.S. 15, 21 (1971).

[29] Another example of non-random overblocking is the frequent blocking of sites that criticize filtering software. *See* Expert Report of Geoffrey Nunberg, at 75 (PX 70); 3/26/02 Tr. 237-38, 258 (testimony of Christopher Hunter).

This kind of rampant overblocking was found by the district court to be an inevitable feature of software that attempts to categorize the huge and constantly changing world of the Internet, because of the inherent trade-off between accuracy of categorization (avoiding overblocking) and comprehensiveness of coverage (avoiding underblocking). "[A]ny filter that blocks enough speech to protect against access to visual depictions that are obscene, child pornography, and harmful to minors, will necessarily overblock substantial amounts of speech that does not fall within these categories." *Id.* 151a.

Mandatory blocking thus cannot be viewed as narrowly tailored to serve the asserted interest in protecting unwilling viewers – or any other legitimate governmental interest.[30] Rather, it is a blunt instrument for use in an area that requires far more "sensitive tools." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). As this Court has explained, "[t]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." *Playboy*, 529 U.S. at 817 (internal quotation marks and citation omitted).

The Government does not directly challenge any of the district court's factual findings about filters' ineffectiveness. Instead, it seeks to minimize the problem by conjuring up additional facts. The Government's brief extrapolates from one expert's testimony and a recently published study not in the record to reach the conclusion that filtering software erroneously blocks approximately one percent of all Web sites. U.S. Br. 34-35. But neither cited source remotely supports such a conclusion,[31] and

[30] Indeed, the Government itself does not really claim otherwise. In its half-hearted, two-paragraph section arguing that strict scrutiny is satisfied, it does not even acknowledge that the speech blocked extends beyond obscenity and pornography. U.S. Br. at 39-40.

[31] The study by plaintiffs' expert Benjamin Edelman was an effort to compile a large number of overblocking examples. Although he began with 500,000 URLs gathered from the Web, and created a list of between 4,403 and 4,783 overblocks, the set of 500,000 was never intended to be representative of the Web, nor were the identified overblocks described as a comprehensive list. J.A. 297-99, 302, 353 (testimony of Benjamin Edelman).

As for the recent publication cited by the Government, *see* Carolyn R. Richardson et al., *Does Pornography-Blocking Software Block Access to Health Information on the Internet?*, 288 JAMA 2887 (2002), it was never presented to the district court and used a methodology criticized (when used by several expert witnesses) by the court as fundamentally flawed. *See* J.S. App. 69a-70a. In any event, the report largely supports concerns about content-based overblocking. The researchers found that "[a]t the least restrictive setting, where products were supposed to block pornography only, about 10% of nonpornographic health information sites returned from searches using the terms *safe sex*, *condom*, and *gay* were blocked, while for most other searches less than 1% of health sites were blocked." Richardson, 288 JAMA at 2891. Further, "with searches on *safe sex*, . . . 33% of health sites were blocked by at least 1 of the products, even on the least restrictive setting." *Id.* at 2892.

even if they did, erroneous censorship of one percent of the approximately 2 billion Web pages can hardly be characterized, to use the Government's word, as "negligible." *Id.* at 35.

The district court found it more relevant to look at the blocks actually imposed by the available software when used in a library setting, and to ascertain what percentage of those blocks were erroneous. *See* J.S. App. 70a. Using that approach, the Government's own expert found that between 6% and 15% of the blocked sites "contained no content that meets even the filtering products' own definitions of sexually explicit content, let alone the legal definitions of obscenity or child pornography." *Id.* 149a. The court explained in detail why "these percentages significantly underestimate the amount of speech that filters erroneously block, and at best provide a rough lower bound on the filters' rates of overblocking." *Id.* In other words, there can be little doubt that the censorship that would actually result from mandating use of filtering software in the library setting would go far beyond restrictions that could be called "narrowly tailored" to achieving any legitimate goal.

In a final effort to minimize this problem, the Government suggests that "[a]ny information that may be erroneously blocked can often be found on another Web site or on the library's bookshelves." U.S. Br. at 35. This assertion is not supported

by any evidence, and ignores the fact that many Web sites contain unique expression. Further, it is no answer to the wrongful censorship of such expression to say that a patron may find similar speech elsewhere. *See, e.g., Reno*, 521 U.S. at 880 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (internal quotation marks and citation omitted); *Conrad*, 420 U.S. at 556.

3. *Less restrictive alternatives.* Because CIPA's ban on speech is so wide, and includes a significant amount of Internet speech that is in no way related – much less tailored – to the images CIPA seeks to prohibit, the law fails strict scrutiny even without the existence of less restrictive alternatives. But even if that were not true, "[t]he breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as [CIPA]." *Reno*, 521 U.S. at 879. Not only has the Government not met that burden, it essentially ignores the numerous alternative methods identified by appellees at trial for satisfying the government's purported interests. As the district court found, these alternatives include the *optional* use of blocking software, possibly controlled by parents of children below a certain age; mandatory use of blocking software only for younger children (either by directing children to specified computers or through age identification policies); enforcement of local Internet use policies; training in Internet usage; steering patrons to sites selected by librarians; installation of privacy screens or recessed monitors; and the segregation of unblocked computers or placement of unblocked computers in well-trafficked areas. *See* J.S. App. 41a-45a.[32]

[32] Disregarding nearly all of these alternatives, the Government argues only that a "tap on the shoulder" policy is more restrictive than mandatory blocking software, citing as an example the Greenville County, South Carolina library that chose mandatory filtering after experimenting with an Internet monitoring policy. U.S. Br. at 37-38. The district court found, however, that libraries may implement an Internet use enforcement policy in ways that are less restrictive than mandatory blocking software – for example by reviewing Internet use logs to ensure that library computers are not being used to access child pornography. J.S. App. 159a-162a. But even accepting the Government's argument that a "tap on the shoulder" policy is more restrictive than mandatory blocking software, that does not explain why all of the other available options, standing alone or in combination, are ineffective. Indeed, the Greenville County library never attempted to use a number of alternatives, including, for example, optional filtering. And although the Greenville library witnesses testified that the library's previous attempts to address problems related to patrons viewing sexually explicit Web sites had been ineffective, those problems persisted even *after* Greenville installed its blocking software. *See id.* 41a, 77a; DX 134 (Greenville incident log showing Internet-related complaints after installation of blocking software).

These less restrictive alternatives may not be perfect, but the Government failed to prove that they are sufficiently ineffective to justify Congress's decision to opt in favor of mandatory blocking software everywhere. "It is no response that [a less restrictive alternative] . . . may not go perfectly every time." *Playboy*, 529 U.S. at 824. Indeed, it is difficult to conceive of how the Government could prove the relative ineffectiveness of all other alternative methods, when 93% of public libraries manage Internet-related issues employing these methods.[33] For example, the Government has failed to address, much less prove, why the use of optional filtering, with parental permission for younger children, would not address the diverse needs of a community while protecting children from the harms potentially caused by accessing adult sites. *See Playboy*, 529 U.S. at 824 ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."). Similarly, the Government says little or nothing about why privacy screens and recessed monitors are not a better alternative than imperfect filtering software to protect passersby from inadvertently viewing sexually explicit images.

Nor has the Government presented comparative evidence

[33] The district court heard testimony from several libraries that testified that they use many of the alternatives and receive few complaints. *See* J.S. App. 42a-43a, 45a, 166a.

of mandatory blocking software and the alternative methods used by the majority of libraries. Accordingly, it has failed to meet its burden of proving that CIPA is the least restrictive way to further the government's interests. *See id.* at 826 (government's criticism of alternative methods does not justify speech restriction where "[t]he record is silent as to the comparative effectiveness of the two alternatives").

The Government's argument that blocking software is the only effective means to serve a library's "interest in preventing patrons from deliberately using the library's computers to view online pornography," U.S. Br. at 38, is a red herring. Even if the government could be said to have a compelling interest in preventing *adult* patrons from intentionally viewing sexually explicit sites regardless of whether anyone else could see those sites, the district court found that blocking software in fact regularly fails to block such sites. J.S. App. 67a, 77a, 91a.[34] At best, installation of blocking software will delay a patron's effort to locate sexually explicit Web sites; there will still be a multitude of such sites accessible to determined users of Internet terminals in libraries. Given the serious questions about the general efficacy of blocking software, and the near absence of evidence questioning – let alone disproving – the sufficiency of the proposed alternatives, the Government has utterly failed to carry its burden of showing that CIPA is the only effective means for serving the government's interest (assuming that interest could ever justify such a broad suppression of speech). *Cf. Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2537 (2002) (underinclusiveness of speech restriction casts doubt on the asserted government interest being served).[35]

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[34] Even the very limited study of Government expert Christopher Lemmons concluded that four commonly used blocking products failed to block 8% of 200 "hard core pornographic" sites chosen by Lemmons, with one of the most popular products, Cyber Patrol, failing to block over 17% of those sites. *See* DX 184, at 1, 3-4 (Expert Report of eTesting Labs).

[35] Further, it is not as if Congress was unaware of less restrictive alternatives when it passed CIPA. As previously noted, while it was considering CIPA, Congress had before it other bills that would have served

4. *Discretionary disabling*. The Act's disabling provisions do not cure the overbroad reach of CIPA's restrictions; to the contrary, they *exacerbate* the statute's constitutional infirmities. As an initial matter, CIPA merely allows, but does not require, library authorities to disable Internet filtering software. *See* 47 U.S.C. § 254(h)(6)(D); 20 U.S.C. § 9134(f)(3). Nothing prevents a library authority from denying a disabling request for any reason (or no reason at all), and there are no procedures for an appeal or review of the decision.[36] Accordingly, the disabling provisions fall within the long-disfavored category of statutes that "vest[] unbridled discretion in a government official over whether to permit or deny expressive activity." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755 (1988).

Moreover, the district court found as a fact that patrons would be unlikely to request unblocking of sites on sensitive topics – including, for example, sites on health and sexuality – because of the stigma attached to making such a request. J.S. App. 47a-48a, 171a-73a. The disabling provisions thus impose a chilling effect on requesting library patrons that reinforces CIPA's constitutional failings. *See, e.g., Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2089 (2002) (holding that ordinance requiring speakers to surrender anonymity violates First Amendment); *Denver Area*, 518 U.S. at 754 (noting that "written notice" requirement for access to "patently offensive" cable channels will "restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel"); *Lamont v. Postmaster Gen. of the*

CIPA's purported goals without imposing its sweeping speech restrictions. *See supra* pp. 3-4 and notes 5 & 6.

[36] In addition, to the extent the disabling provisions help cure CIPA's constitutional flaws, that cure applies only to adult patrons (for libraries receiving E-rate discounts). *Compare* 20 U.S.C. § 9134(f)(3) (disabling provision applicable during any patron Internet use) *with* 47 U.S.C. § 254(h)(6)(D) (disabling provision applicable only during adult use). There is no rational explanation for the distinction between E-rate and LSTA disabling provisions, and the Government has never attempted to offer one.

United States, 381 U.S. 301, 307 (1965) (striking requirement that recipients of Communist literature notify the Post Office that they wish to receive those materials). That chilling effect is exacerbated by the fact that a patron cannot see the blocked sites, and thus (1) may not know whether they then contain the information sought and (2) may not know whether they are in fact sexually explicit.

Nor is there a practical way to process unblocking requests anonymously without substantially burdening a patron's right to receive information on the Internet. The district court found that most libraries that used blocking software did not offer a way to request unblocking anonymously, and the one that did took from 24 hours to one week to process the request. J.S. App. 46a, 174a. Notwithstanding the Government's claims to the contrary, U.S. Br. at 35-37, that delay is itself a substantial burden. *See Watchtower Bible*, 122 S. Ct. at 2090 (ordinance that effectively bans "a significant amount of spontaneous speech" violates the First Amendment). This is particularly true in the context of Internet access, which, by its very nature, often involves immediate and spontaneous "surfing" for information. *See Denver Area*, 518 U.S. at 754 (delay in cable unblocking process unduly harms viewers "who select programs day by day (or, through 'surfing,' minute by minute)").[37]

II. CIPA IMPOSES UNCONSTITUTIONAL CONDITIONS ON INTERNET FUNDING TO PUBLIC LIBRARIES.

Even accepting the Government's conception of a library's discretion to choose whether and how to filter Internet access,

[37] It is thus no answer that obtaining books through interlibrary loan may also take considerable time. *See* U.S. Br. 36-37. As discussed above, blocking software prevents *immediate* access that would otherwise be available. When that software overblocks protected speech, the problem does not disappear just because it is possible to obtain access days later. In addition, as previously explained, CIPA's disabling provisions are entirely discretionary, whereas libraries will always provide access to all lawful expression through interlibrary loan. J.S. App. 34a. Finally, unlike with a library's failure to carry a book in its physical collection, the blocking of a Web site conveys the message that the blocked expression is disfavored.

the First Amendment prohibits Congress from foisting its own choice on every local library across the country. In its opening brief, the Government warns against federal interference that "could chill libraries from exercising traditional editorial judgments." U.S. Br. at 20; *see also id.* at 17, 19, 22, 24, 31. Yet CIPA supersedes those judgments, effectively preventing public libraries from determining, on a local level, what information to provide to their communities. Prior to CIPA's enactment, 93% of public libraries across the country decided – based on their experience, professional judgment, patron demand, and knowledge of their communities – to reject mandatory filtering. Through CIPA, however, Congress has overridden those local decisions, imposing its own, one-size-fits-all solution nationwide. CIPA thus violates the First Amendment by interfering with and distorting the informational exchange between library and patron.[38] It then exacerbates that constitutional harm by including within its restrictive conditions library Internet access supported by non-federal funds.

CIPA's far-reaching mandate is not insulated from judicial review simply because the direct funding recipients, libraries, are government entities. The constitutionality of a funding condition depends on its overall impact on protected speech, not simply on the status of the direct grantee. CIPA violates the guiding principle, reflected in the Court's funding cases, that the government may not use the power of the purse to restrict or distort avenues of private expression. In any event, if the Court reaches the question, it should recognize that public libraries do possess First Amendment rights that protect against CIPA's sweeping federal command.

[38] Although finding it unnecessary to its holding, the district court observed in a lengthy footnote that the plaintiffs "have a good argument that CIPA's requirement that public libraries use filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds." J.S. App. 180a-188a n.36.

A. CIPA's Federal Mandate Distorts the Usual Functioning of Public Libraries.

The Government's argument that local librarians have the constitutional authority to make their own professional judgments about blocking software, even if accepted, does not begin to justify an effort by Congress to induce libraries to make its preferred choice. Patron demand, librarians' professional judgment, community preference, a library's physical configurations, and local informational needs are all rendered irrelevant under the Act. CIPA's nationwide funding mandate thus transforms and severely undermines the expressive relationship between library and patron. Through CIPA, "the Government seeks to use an existing medium of expression and to control it, . . . in ways which distort its usual functioning." *Velazquez*, 531 U.S. at 543. The First Amendment forbids such federal coercion.

The Court consistently has distinguished between funding programs in which the state itself acts as a speaker and those in which the government "'expends funds to encourage a diversity of views from private speakers.'" *Velazquez*, 531 U.S. at 542 (quoting *Rosenberger*, 515 U.S. at 834). Although, in the former situation, the state enjoys considerable leeway to tailor its message, in the latter case, the First Amendment forbids content-based limits on the funded expression. *See, e.g., Velazquez*, 531 U.S. at 542; *Rosenberger*, 515 U.S. at 833-34; *FCC v. League of Women Voters*, 468 U.S. 364, 383, 392, 395 (1984).

As much as any American institution, the public library is "designed to facilitate private speech," *Velazquez*, 531 U.S. at 542, expanding the marketplace of ideas and information available to the local community. The library serves as a collector, provider, and amplifier of private expression, and public Internet access in libraries – regardless of its form – magnifies those speech-enhancing roles. Appellants have not even attempted to characterize E-rate and LSTA funding or CIPA's restrictions as

federal government speech, because they could not.[39] Consequently, because libraries are "engaged in a vital and independent form of communicative activity," *League of Women Voters*, 468 U.S. at 378, the government may not use its funding power "in an unconventional way to suppress speech inherent in the nature of the medium." *Velazquez*, 531 U.S. at 543.[40]

CIPA violates this basic precept. Its conditions strip libraries of all local discretion and control over the provision of public Internet access, ultimately constricting the universe of information available to patrons.[41] Just as the statute in *Velazquez* constrained

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[39] The Government nonetheless places great reliance on *Rust v. Sullivan*, 500 U.S. 173 (1991), a case in which the funding program at issue "amounted to governmental speech." *Velazquez*, 531 U.S. at 541; *see also Rosenberger*, 515 U.S. at 833 (in *Rust*, federal government "did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program"); *cf. Board of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217 U.S. 529 U.S. 217, 235 (2000) (where, as in *Rust*, "the government speaks," rather than facilitating a broad range of private expression, the analysis is "altogether different"). Because funding to libraries does not advance federal government speech, *Rust* is wholly inapposite.

[40] The Government argues that the strictures of the Court's funding cases apply only if the recipients have a "role that pits them against the government." U.S. Br. at 43. No such limitation exists. The invalidated regulation in *League of Women Voters*, for example, was simply content-based, restricting *all* "editorializing" by recipients, regardless of the recipient's viewpoint or policy toward the government. *See* 468 U.S. at 383 ("[T]he scope of § 399's ban is defined solely on the basis of the content of the suppressed speech."); *id.* at 384 ("'[T]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibitions of public discussion of an entire topic.'" (quoting *Consolidated Edison Co. v. Public Serv. Comm'n of NY*, 447 U.S. 530, 537 (1980)).

[41] The First Amendment injury here is magnified by the crucial role libraries play in providing Internet access to underserved communities. Because the E-rate and LSTA programs are designed to narrow the "digital divide," *see supra* p. 7, CIPA distorts the function of those programs by perpetuating gaps in Internet access among various groups. Under CIPA, those who rely on public libraries for Internet service will have substantially more restricted access to information than will people who have Internet access at home.

federally funded attorneys in making choices central to the performance of their professional duties, 531 U.S. at 542-44, and the statute in *League of Women Voters* limited expressive choices of public broadcasting stations, 468 U.S. at 383, CIPA unduly restricts librarians in exercising their professional judgments about how and to what extent information and ideas will be made available to the public. In *Velazquez*, the Court facially invalidated a funding condition that required recipients to make one particular professional choice, the decision not to challenge existing welfare law. Similarly, CIPA unlawfully requires E-rate and LSTA recipients to make one particular professional choice: the decision to mandate blocking software for all patrons. "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *Playboy*, 529 U.S. at 818; *cf. New York Times v. Sullivan*, 376 U.S. 254, 269-71 (1964) ("The First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than *through any kind of authoritative selection*. To many this is, and always will be, folly; but we have staked upon it our all.") (internal quotation marks omitted) (emphasis added).

The Government suggests that CIPA does not impermissibly "distort[] the usual functioning" of public libraries because "[p]roviding patrons with illegal or harmful pornography is not 'inherent' in the role of public libraries." U.S. Br. at 43-44. This reasoning is misguided in two fundamental respects. First, the Government again ignores the district court's extensive factual findings that filtering software inevitably blocks access to vast amounts of Internet expression that is neither "illegal" nor "harmful pornography." Second, even disregarding its faulty factual assumptions about blocking software, the Government misapprehends the First Amendment injury recognized in the Court's funding cases. Regardless of the constitutional status

of any given library's Internet policy,[42] CIPA distorts the ability of libraries nationwide to decide for themselves and their communities the form and nature of those policies. That 93% of public libraries have adopted Internet use policies different from the one now dictated from Washington underscores the extent of CIPA's unlawful distortion.

In addition, the unconstitutionality of CIPA's conditions is magnified exponentially by the broad reach of the Act's blocking mandate, which covers library Internet access not even subsidized by the federal funding programs. Under the statute, a public library receiving E-rate or LSTA funding must certify that blocking software operates on "*any* of its computers with Internet access" during "*any use* of such computers," 20 U.S.C. § 9134(f)(1)(A), (B) and 47 U.S.C. § 254(h)(6)(B), (C) (emphasis added). Thus, the law requires libraries to block speech even on computers and Internet connections wholly funded by non-federal money. As in *League of Women Voters*, this creates an unconstitutional funding scheme because a recipient that "receives only 1% of its overall [Internet funding] from [federal] grants is barred absolutely" from all provision of unfiltered Internet access. 468 U.S. at 400.[43]

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[42] In *League of Women Voters*, for instance, any broadcaster lawfully could have decided never to "engage in editorializing," 468 U.S. at 366. Likewise, a funded attorney in *Velazquez* constitutionally might have opted not to "challenge existing law," 531 U.S. at 538, for a particular client. The constitutional infirmity in both cases lay in the condition that funding recipients make those choices in every circumstance.

[43] Although the two federal programs restricted by CIPA are important sources of funding for many libraries across the country, the amount of funding is irrelevant to First Amendment analysis. To establish an unconstitutional condition, plaintiffs need demonstrate only that the funding condition is aimed at restricting First Amendment rights. *See, e.g., League of Women Voters*, 468 U.S. at 400; *id.* at 390 n.19 (invalidating federal funding restriction despite fact that "vast majority of financial support comes instead" from state, local, and private sources); *cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992) (striking down assembly and parade permit fee ordinance) ("Neither the $1,000 cap on the fee charged, nor even some lower nominal cap, could save the ordinance because in this context, the level of the fee is irrelevant. A tax based on the content of the speech

The Government suggests that a recipient library can insulate non-federal funds from CIPA's mandate simply by offering unfiltered access at "an affiliated library that does not receive federal assistance for Internet access." U.S. Br. at 42. This argument ignores the unequivocal language of the Act, which plainly requires a library to certify that it has installed filters on "*any* of its computers with Internet access." Nothing in CIPA suggests that smaller affiliates or branches of public libraries can be treated as separate entities independent of the public libraries of which they legally are a part. Moreover, even if public libraries had the legal authority, community approval, and financial ability to establish separate legal entities funded entirely with non-federal grants, that would not save the Act. Nothing prohibited the station owners in *League of Women Voters* from creating new, wholly independent stations with non-federal funds, nor were the Legal Services attorneys in *Velazquez* prevented from opening entirely separate, private legal services centers. In those cases, as here, the funding condition was unconstitutional because the actual, direct grantee – including any of its subdivisions – was "barred from using even wholly private funds to finance its" First Amendment activity. *League of Women Voters*, 468 U.S. at 400.

B. CIPA's Funding Conditions on Public Libraries Are Subject to First Amendment Challenge.

1. The Government attempts to shield CIPA entirely from the Court's speech funding cases, arguing that the First Amendment does not apply to conditional funding that flows directly to government entities like public libraries. *See* U.S. Br. at 40-42. The Court, however, has never recognized such a doctrinal limitation. Although, as discussed below, *infra* Point II.B.2, public libraries do possess First Amendment rights against federal overreaching, "whether and to what extent [libraries] have First Amendment rights" is "the wrong question" in this case. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775-76 (1978). As the Court explained in *Bellotti*,

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does not become more constitutional because it is a small tax.").

> The Constitution often protects interests broader than those of the party seeking vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged statute] abridges expression that the First Amendment was meant to protect.

Id. at 776. *Cf. City of Madison*, 429 U.S. at 175 n.7 (Court "need not decide whether a municipal corporation as an employer has First Amendment rights to hear the views of its citizens and employees" because those rights are "inextricably meshed" with speakers' rights) (internal quotation marks omitted).

The constitutionality of coercive federal funding schemes thus turns on the overall speech-disruptive impact of the challenged condition, not merely on the rights of the direct recipients. In *League of Women Voters*, for example, the Court invalidated a content-based condition on federal funding to noncommercial broadcasting stations. 468 U.S. at 402. The Court did not distinguish, for purposes of First Amendment analysis, between the privately owned grantee stations and those owned and controlled by State and local governments. *See id.* at 393-94 & n.22 (indicating that "at least two-thirds of the public television broadcasting stations in operation are licensed to (a) state public broadcasting authorities or commissions, . . . (b) state universities or educational commissions, or (c) local school boards or municipal authorities"). Rather, the Court sustained a facial challenge to the funding condition, highlighting not only the direct grantees' rights but also "the public's 'paramount right' to be fully and broadly informed." *Id.* at 399. *Cf. Pico*, 457 U.S. at 866 (plurality opinion) (Court has focused on the First Amendment's "role in affording the public access to discussion, debate, and the dissemination of information and ideas") (internal quotation marks omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . .").

Similarly, the funding condition in *Velazquez* was constitutionally suspect because of its adverse impact on protected expression generally, and not simply on the rights of the immediate recipients. In striking the challenged restriction, the Court considered the condition's effect both on the direct grantee attorneys and, more importantly, on the indirect beneficiaries, their clients. *See Velazquez*, 531 U.S. at 536, 546-47. As was clear in *Velazquez*, funding cases look to the ultimate harm inflicted on "an existing medium of expression," asking whether the government, wielding its financial power, seeks to control the medium "in ways which distort its usual functioning." *Id.* at 543.

Thus, even assuming that a given library's mandatory filtering policy could pass constitutional muster, and even if public libraries lacked independent First Amendment rights – propositions appellees dispute – CIPA is still invalid because it interferes with the traditional information exchange between library and patron.[44]

2. In any event, public libraries enjoy First Amendment protection from federal speech restrictions, and can therefore challenge CIPA's funding conditions on their own behalf. The constitutional text, analogous case law, and fundamental free speech and federalism principles all support the recognition of certain First Amendment rights for local governmental entities. While those rights are not necessarily coextensive with the expressive rights of private citizens, they surely guard against CIPA's federal usurpation of local decisionmaking and autonomy.

Notwithstanding their view of the local library as "a market participant," U.S. Br. at 30, appellants argue that libraries, as

[44] This is true for another reason: libraries may sue to vindicate the underlying expressive rights of their patrons. *See, e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (booksellers have standing to sue on behalf of their customers); *Craig v. Boren*, 429 U.S. 190, 194 (1976); *City of Madison*, 429 U.S. at 175 n.7; *Procunier v. Martinez*, 416 U.S. 396, 409 (1974). In addition, both the ALA and Multnomah cases were brought by private patron plaintiffs, as well as libraries and library associations.

"government entities[,] do not have First Amendment rights" under any circumstances. *Id.* at 40. Nothing in this Court's jurisprudence or in the lower court decisions cited by appellants, however, supports that broad assertion.[45]

[45] Contrary to the Government's suggestion, this Court has never ruled that local governments lack First Amendment rights. In *CBS, Inc. v. Democratic Nat'l Comm'n*, 412 U.S. 94 (1973), the Court addressed the question "whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak out on issues they consider important violates the Federal Communications Act of 1934 . . . or the First Amendment." *Id.* at 97. The Court answered in the negative, and never addressed the question presented here. Nor does Justice Stewart's concurrence in *CBS* speak to the issue of municipalities' First Amendment rights *vis à vis* the federal government. *See id.* at 139 & n.7 (1973) (Stewart, J., concurring). Indeed, in his discussion of state action and government speech in *CBS*, Justice Stewart emphasized that "[g]overnment is not restrained by the First Amendment from controlling *its own expression*." *Id.* (emphasis added).

Likewise, the holdings of the lower court decisions cited by defendants, *see* U.S. Br. at 40-41, in no way implicate the issue in this case. At most, each of those decisions mentions a governmental entity's First Amendment rights only in dicta, ultimately *rejecting* private parties' challenges to the respective government's ability to convey its own message. *See, e.g., Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) (rejecting private cable company's First Amendment challenge to municipal ordinance authorizing city to operate competing cable system, reasoning that "government may participate in the marketplace of ideas and contribute its own views to those of other speakers") (internal quotation marks omitted); *NAACP v. Hunt*, 891 F.2d 1555, 1565-66 (11th Cir. 1990) (upholding as permissible government speech State's flying of confederate flag over capitol dome); *Student Gov't Ass'n v. Board of Trs. of the Univ. of Mass.*, 868 F.2d 473, 481-82 (1st Cir. 1989) (rejecting challenge to state university's decision to abolish legal services office that was "an administrative unit of the [u]niversity," and holding that contrary rule would "unduly restrict[] the state's ability to control its speech"); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989) (denying attorney's First Amendment challenge to state bar journal's refusal to publish attorney's responsive speech, and explaining that "the First Amendment does not preclude the government from exercising editorial control over its own medium of expression") (internal quotation marks omitted); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1038 (5th Cir. 1982) (rejecting claim by private listeners to compel government-owned television stations to air controversial program,

Although this Court has not yet addressed the First Amendment rights of local governments, it is clear that other guarantees in the Bill of Rights (in addition to the Tenth Amendment) protect municipalities from the type of federal government intrusion worked by CIPA. For example, while the Takings Clause of the Fifth Amendment refers only to "private property," local governments can invoke that Amendment against action by the United States. *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). The First Amendment, which simply sets forth limits on congressional power to abridge "the freedom of speech," U.S. Const. amend. I, should apply to municipal governments with even greater force. Indeed, according some First Amendment rights to municipalities is consistent with one of the original purposes of the Bill of Rights: to protect state and local governments against federal abuses of power. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 4-5, 7, 21-24 (1998).[46]

CIPA exemplifies those abuses. The Act conscripts public libraries into Congress's filtering mission, without taking into account the views or preferences of local communities. It overrides librarians' professional judgments and narrows the universe of available information, particularly in low-income communities. The First Amendment cannot permit that result.

Under the Government's theory that municipalities have absolutely no First Amendment rights, Congress could, for example, condition library funding on the selection of particular books and the exclusion of others. In addition, Congress could require, as a condition on federal grants to help municipalities

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and noting that "'[g]overnment is not restrained by the First Amendment from controlling its own expression'" (quoting *CBS*, 412 U.S. at 139 n.7 (Stewart, J., concurring)).

[46] Giving local governments certain First Amendment protections also comports with this Court's treatment of municipalities as persons in other contexts. *See, e.g., Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978) (municipalities are "persons" under 42 U.S.C. § 1983); *Moor v. Alameda County*, 411 U.S. 693, 717-21 (1973) (municipalities are "citizens" for purposes of diversity jurisdiction).

combat terrorism, that local governments refrain from passing resolutions about war in the Persian Gulf. Indeed, the logical implications of the Government's position would permit the federal government to impose those restrictions *directly*, without relying on any funding authority. This clearly would threaten core First Amendment values. *See, e.g., Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) ("There is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern.").[47]

Ultimately, the Government's theory asks the Court to disregard the distinction between federal and local government. Although the Constitution permits the government to control its own expression or that of its agencies and subdivisions, *see Board of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217 U.S. 529 U.S. 217, 235 (2000); *Velazquez*, 531 U.S. at 541; *Rosenberger*, 515 U.S. at 833, municipalities are not simply arms of the federal government whose speech can be readily manipulated from Washington. *See Denver Area*, 518 U.S. at 773 ("The Federal Government has no more entitlement to restrict the power of a local authority to disseminate materials on channels of its own creation, than it has to restrict the power of cable operators to do so on channels they own.") (Stevens, J., concurring); *Creek*, 80 F.3d at 193; *Township of River Vale v. Town of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968); *cf. Printz v. United States*, 521 U.S. 898, 920-21 (1997) ("As Madison expressed it: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'") (quoting

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[47] Several lower courts have recognized that local governments enjoy First Amendment protections. *See County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) ("A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual."); *Nadel v. Regents of the Univ. of Cal.*, 34 Cal. Rptr. 2d. 188, 194 (Cal. App. 1994) (holding First Amendment applicable in libel action against public university).

The Federalist No. 39, at 245).

To be sure, the First Amendment rights of public libraries are not coextensive with those of private speakers or listeners. Indeed, as a state actor, the library itself is still constrained by the First Amendment rights of patrons. *See supra* Point I. And Congress may lawfully ask states and localities administering a federally funded program to express views consistent with the message of that program. The Government seeks to fit CIPA within the latter doctrine. U.S. Br. at 44. But that suggestion ignores the difference between government speech and government support of opportunities for private speech. When serving as a "megaphone amplifying voices that might not otherwise be audible," *Creek*, 80 F.3d at 193; *see also, e.g.*, Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications By Organizations, Communities, and the State*, 79 Cal. L. Rev. 1229, 1261-64 (1991), or a local provider of others' expression, *cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994), the public library should be able to invoke the First Amendment's protections to thwart restrictive federal regulation. It is not necessary to define the precise contours of libraries' constitutional rights, *see Bellotti*, 435 U.S. at 777, to recognize that the First Amendment shields them from CIPA's sweeping mandate.

CONCLUSION

For the foregoing reasons, the judgment of the district court holding CIPA unconstitutional should be affirmed.

Respectfully Submitted,

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